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No. 80-904

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF CALIFORNIA,
*Petitioner,*

vs.

DOROTHY MAE HALL,
*Respondent.*

## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIRST APPELLATE DISTRICT OF THE STATE OF CALIFORNIA

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## QUESTIONS PRESENTED

The question as presented by the petitioner is:

> "Whether the exclusionary rule compels suppression of evidence seized under a search warrant because a State Magistrate has mistakenly concluded that the supporting affidavit furnished probable cause."

An accurate statement of the question presented is as follows:

> "Whether the exclusionary rule as adopted by the courts of the State of California compels suppression of evidence seized under a search warrant because a Magistrate has mistakenly concluded that the supporting affidavit furnished probable cause."

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## CONSTITUTIONAL PROVISIONS

Constitutional Provisions Involved United States Constitution, Amendment IV:

> "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

California Constitutional Provisions Involved Are California Constitution Article 1, Section 13:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

## STATEMENT OF THE CASE

### A. Procedural History

Respondent accepts the statement of the procedural history insofar as it goes in the petition, however, the history is incorrect wherein it states on page 3, that the sole basis for this ruling was the conclusion of the Court of Appeal that the Magistrate had issued warrants based on a police affidavit which failed to satisfy the standards set forth in *Aguilar v. Texas,* (1964) 378 U.S. 108 and *Spinelli v. United States,* (1969) 393 U.S. 410.

The California Court of Appeal based its decision also on *People v. Hamilton* (1969) 71 Cal.2d 176 and *People v. Schmidt* (1980) 102 Cal.App.3d 172.

### B. Statement of Facts

Respondent accepts the statement of facts as set forth in the petition.

## REASONS FOR DENYING WRIT

The citation of *People v. Moore* (1973) 31 Cal.App.3d 919, 927, is taken entirely out of context. *People v. Moore* involved a clerical error in a search warrant; it did not in-

volve a total failure of the showing of the reliability of an informant as in the instant case. Petitioner also neglected the citation of *People v. Cahan* (1955) 44 Cal.2d 434, where the court in *Moore* on page 923 stated: "We have been compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rules have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers." The court in *Moore,* still on page 923, went on to state: "In People v. Benford (1959) 53 Cal.2d 1, a pre-*Mapp* case, the court said, ". . .California bases exclusion of evidence obtained by unconstitutional search and seizure, not upon due process, but upon the court's 'regard for its own dignity as an agency of justice and custodian of liberty.'" (On page 15)

The quotes taken from *People v. Kirk* (1974) 43 Cal.App. 3d 921, 925, also on page 5 of the petition, are also taken out of context. In that case there was a warrant of questionable validity, however, the court did not have to decide that issue because the court held in *Kirk* that there were other facts disclosed by the evidence which gave the officers reasonable and probable cause to effect the arrest without a warrant.

Petitioner goes on to state what the rule should be as:

> "A search warrant issued by a judicial officer may not be attacked on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indici of probable cause as to render reliance upon it wholly unreasonable."

To adopt such a rule would be to in effect completely change the wording of the constitution and it is certainly not warranted by any change in police conduct since the inception of the exclusionary rule.

Petitioner has not set forth any showing of the ineffectiveness of the exclusionary rule, and further, that anything has changed between the time of its inception and now which would necessitate any less protection of the citizens from over excessive governmental intrusions.

Petitioner further asserts that the affidavit was found sufficient by a Magistrate and two trial court judges which is incorrect, it was found sufficient by a Magistrate, who was not the issuing officer, and a single subsequent trial judge, and was then held to be unconstitutional by the Appellate Court applying not standards set down by the U.S. Supreme Court but by the courts of the State of California.

The allegation that it cannot be said that the Magistrate who relied upon the affidavit acted unreasonably is certainly open to question as is the conclusion of the petitioner that this case illustrates the need for refinement of the exclusionary rule.

The imperative of judicial integrity requires continued viability of the existing "Exclusionary rule" in federal courts and the U.S. Supreme Court should respect the obvious application of the independent state grounds upon which this case was grounded.

## ARGUMENT

### I

### THE FEDERAL RULES REGARDING THE EXCLUSION OF EVIDENCE AS IT RELATES TO INVALID SEARCH WARRANTS SETS FORTH ONLY A MINIMUM STANDARD WHICH IS APPLICABLE TO STATES, AND STATES ARE FREE, UNDER THEIR OWN CONSTITUTIONS AND ON INDEPENDENT STATE GROUNDS, TO PROMULGATE STRICTER RULES

Article 1, Section 13 of the State of California states that a warrant may not issue except upon probable cause.

California Constitution Article 1, Section 13 requires a more exacting standard with respect to searches and seizures for cases arising in this state than the minimum standards required to satisfy the Fourth Amendment's proscription of unreasonable searches. *People v. Brisendine* (1975) 13 Cal.3d 528.

The exclusionary rule was first adopted in 1955 by the California Supreme Court in *People v. Cahan* (1955) 44 Cal.2d 434, on page 438 where it stated: "Thus both the United States Constitution and the California Constitution make it emphatically clear that important as efficient law enforcement may be, it is more important that the right of privacy guaranteed by these constitutional provisions be respected. Since in no case shall the right of the people to be secure against unreasonable search and seizure be violated, the contention that any unreasonable search and seizure is justified by the necessity of bringing criminals to justice cannot be accepted. It was rejected when the constitutional

provisions were adopted and the choice was made that all the people, the guilty and innocent alike should be secure from unreasonable police intrusions, even though some criminals should escape."

Contraband illegally seized in violation of Article 1, Section 13 of the California Constitution is inadmissible as evidence. *People v. Brisendine*, 13 Cal.3d 528, 545; *People v. Cahan, supra.*

The ability of state courts to formulate stricter standards than those required by the United States Supreme Court is beyond question; the Federal Bill of Rights as applied to the states through the Fourteenth Amendment guarantees a minimum of protection which a state court cannot abridge: ". . . it does not forbid a state from according a *greater* degree of such protection." (emphasis original) *Curry v. Superior Court* (1970) 2 Cal.3d 707, 716. See also California Declaration of Rights, Hastings Law Journal, Volume 26 (1974) "Rediscovering the California Declaration of Rights", page 481.

In *People v. Brisendine, supra,* the California Supreme Court held that it is not bound by the United States Supreme Court's interpretation of the Fourth Amendment in construing a substantially identical clause of the California Constitution barring unreasonable searches and seizure. In *Brisendine,* the court refused to follow the *United States v. Robinson,* 414 U.S. 218 (1973), and *Gustafson v. Florida,* 414 U.S. 260 (1973), and instead decided the case on the basis of the California Constitution. The significance of *Brisendine, supra,* involving the California Constitution as

independent state ground was discussed in an article in 64 Calif. Law Review page 442 entitled, "California Supreme Court".

The issue of probable cause for the issuance of the search warrants was decided in California long before Aguilar-Spinelli. In *People v. Keener* (1961) 55 Cal.2d 714, 721, the courts of California stated, probable cause for the issuance of a search warrant may be based on information furnished by an informant only if the supporting affidavit also recites the facts indicating that reliance of the information is reasonable.

Also in 1963 in *Dunn v. Municipal Court* (1963) 220 C.A. 2d 858, 871, California State Courts held that in order to give validity to a search warrant the affidavit in support thereof must state facts showing the informant was reliable.

The U.S. Supreme Court in *Ker v. California*, 374 U.S. 23; 10 L.Ed.2d 726, stated that state courts have the power to develop workable rules governing arrests, searches and seizures, to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the Fourth Amendment's proscription of unreasonable searches and seizures, and the concomitant demand that evidence so seized is inadmissible.

The California Legislature has enacted its own statutory scheme for attacking search warrants, Penal Code Section 1538.5. In addition, Penal Code Section 1525 states that no warrant shall issue except upon probable cause; tested by that statute reliance on the affidavit was unreasonable.

Penal Code Section 1538.5(d) states:

> "If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissable against the movant at any trial . . ."

Thus, when the warrant was suppressed, the statute, Penal Code Section 1538.5(d), not the invalid warrant precluded the admissibility of the seized evidence.

## II

## THE EXCLUSIONARY RULE DOES REQUIRE SUPPRESSION OF EVIDENCE SEIZED UNDER A JUDICIAL WARRANT BASED UPON AN AFFIDAVIT WHICH FAILS TO ESTABLISH PROBABLE CAUSE DUE TO THE LACK OF SHOWING OF THE RELIABILITY OF AN INFORMANT

Petitioner's argument that *Aguilar v. Texas*, 378 U.S. 108 (1964) and other cases cited therein completely miss the point of *Aguilar*. In *Aguilar* the court held that the warrant was invalid because of the lack of the showing of reliability of the informant. Granted that there was evidence of a Texas statute excluding illegally seized evidence and the court here is certainly aware of *People v. Cahan*, *supra*, which held that illegally seized evidence shall not be admissible in the State of California.

The constitutional provision of the U.S. Constitution, the California Constitution and the penal code sections required that warrants be issued based upon probable cause. In the instant case it was held that there was no probable cause as it was the same as if there were no warrants whatsoever, therefore the evidence was illegally seized.

It seems illogical to state that *Aguilar* does not stand for the proposition that the exclusionary rule is applicable to search warrant cases when in fact the obvious result is when a warrant is issued with no probable cause it is the same as if no warrant has been issued in the first instance. Petitioner appears to concede that *Aguilar* dealt with a failure of the Fourth Amendment standard. Accordingly, it is a troublesome conclusion to state that the application of the exclusionary rule is not before the court nor decided by *Aguilar*.

In any event, California state law clearly makes evidence seized under an illegal warrant inadmissible whatever the situation may be in Texas.

The authorities cited by the Petitioner are certainly not recent in nature and all of them go back to arguments which have existed and which were in existence at the time the exclusionary rule was promulgated.

The exclusionary rule certainly still has vitality and whatever of its shortcomings, "It has made law enforcement agencies aware of constitutional rights and it has necessitated and therefore promoted, professionalism of the police function. There is more than ample evidence that the well arranged and operated and police and sheriffs' departments in California and peace officers, in no significantly lesser percentage than judges, are dedicated to following the law. While the deterred effect of the rule has perhaps been small, its educational and moral force has been great." "BURGER COURT IN THE CALIFORNIA CRYSTAL BALL", Robert S. Thompson, 5 Southwestern University Law Review (1973), page 239.

The argument that the purpose of the "exclusionary rule is deterrence was most probably promulgated during the 1960's. However, the rule was in existence long prior to the 1960's and was stated in 1921 by Justice Clark when he described the Fourth (and Fifth) Amendment as ". . . the very essence of constitutional liberty" and ruled that tainted evidence should be excluded to ". . . full enjoyment of personal liberty and private property." *Gouled v. U.S.*, 255 U.S. 303, 304.

In 1924 in *Byars v. U.S.*, 273 U.S. 28, 33, Justice Southerland argued that illegally seized evidence should be excluded because ". . . to hold (otherwise) would be to disregard the plain spirit and purpose of the constitutional prohibitions intended to secure the people against unauthorized official actions." Justice Butler in 1931, stated for the court in *Go-Bart Improving Co. v. U.S.*, 282 U.S. 344, 357, that government searches outside the Fourth Amendment are ". . .obnoxious to fundamental principles of liberty. . . ." and that courts ". . . owe the duty of vigilance of effective enforcement."

Query, then, whether deterrence was really the objective, or was rather to enhance constitutional liberty and to reassure the people that government lawlessness would not be rewarded by an independent judiciary. (See the "EXCLUSIONARY RULE: ITS NECESSITY IN CONSTITUTIONAL DEMOCRACY," Dr. Steven Cann and Bob Egbert, 23 Howard Law Journal (1980) 299.

Petitioner appears to be arguing a trend in the courts towards forever ridding the criminal justice system of the

exclusionary rule. It is submitted that such time, if it should ever come has not come as of this date.

Petitioner also argues eloquently that the deterrent purpose of the exclusionary rule is ineffective; it is submitted that it is not deterrence which is the essence of the exclusionary rule it is more a statement by the courts that they won't tolerate illegal conduct.

## CONCLUSION

For the reasons stated above, Respondent respectfully urges the court to deny the Petition for a Writ of Certiorari requested herein.

Dated: March 13, 1981

JOSEPH F. LANDRETH
*Attorney for Respondent*